

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
3410 PONS FOOD CORP.	:	DETERMINATION
	:	DTA NO. 813011
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period September 1, 1990	:	
through February 29, 1992.	:	

Petitioner, 3410 Pons Food Corporation, 3410 Broadway, New York, New York 10031, by and through its representative, Manuel Vidal, P.A., filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1990 through February 29, 1992.

The Division of Taxation by its representative, William F. Collins, Esq. (Herbert M. Friedman, Jr., Esq., of counsel), brings this motion for summary determination pursuant to 20 NYCRR 3000.5(c)(1) on the grounds that petitioner failed to file a request for conciliation conference or file a petition for a hearing before the Division of Tax Appeals within 90 days of the issuance of the notice of determination. This motion will be treated as a motion to dismiss for lack of subject matter jurisdiction pursuant to 20 NYCRR 3000.5(b)(ii) based on petitioner's alleged failure to file a timely challenge to the statutory notice. Petitioner did not file a response to this motion.

ISSUE

Whether petitioner's request for a hearing should be denied for failure to timely file a request for conciliation conference with the Bureau of Conciliation and Mediation Services of the Division of Taxation or to timely file a petition for hearing before the Division of Tax Appeals.

FINDINGS OF FACT

The Division of Taxation ("Division") issued a Notice of Determination dated

September 13, 1993 to petitioner, 3410 Pons Food Corp., for the period September 1, 1990 through February 29, 1992. This notice of determination (Notice No. L-007929945-6, hereinafter "the subject notice") set forth additional sales and use taxes due in the sum of \$312,459.00, plus penalty and interest, for a total amount due of \$530,671.86.

The Division's attorney deposes that the notice of determination (Finding of Fact "1") was duly issued to petitioner on September 13, 1993 by certified mail, using certified control number P 911 172 981.

The motion record includes the affidavit of Geraldine Mahon ("the Mahon affidavit"), principal clerk of the Division's Case and Resource Tracking System ("CARTS"). The CARTS system is the Division's computer system for generating, inter alia, notices of determination to taxpayers under Articles 28 and 29 of the Tax Law.

Geraldine Mahon deposes that it is part of her regular duties to supervise the processing of notices of determination prior to shipment to the Division's Mechanical Section (hereinafter "the mail room") for mailing. Ms. Mahon receives the computer printout, entitled "Assessments Receivable, Certified Record of Non-Presort Mail" (hereinafter "certified mail record" or "CMR"), and the corresponding notices of determination generated by the CARTS system. The computer-generated notices are predated with the anticipated date of mailing, and each notice is assigned a "certified control number." The certified control numbers are recorded on the CMR under the heading "Certified No."

The CMR for the block of notices issued on September 13, 1993, including the subject notice, consists of 20 connected, fan-folded pages. All pages are connected when the document is delivered to the U.S. Postal Service and remain connected unless otherwise requested by Ms. Mahon.

Upon examination of the CMR in this matter, which is attached to her affidavit, Ms. Mahon deposes that it is a true copy of the CMR issued by the Division on September 13, 1993, and includes the subject notice issued to petitioner. Ms. Mahon states that the certified control numbers on the CMR run consecutively, and there are no deletions. Each of the pages of the

CMR consist of 11 entries with the exception of page 20 which contains 4 entries. Each entry includes the certified control number, name, address, postage amount and certified mail fee for each taxpayer (addressee), including petitioner. Portions of the CMR have been redacted to preserve the confidentiality of information relating to taxpayers who are not a party to this proceeding.

Ms. Mahon states that in the upper left hand corner of the CMR, page 1, the date 9/3/93 was changed manually to 9/13/93. The original date, 9/3/93, was the date that the CMR was printed. The certified mail record is printed approximately 10 days prior to the anticipated date of mailing of the notices referred to thereon, so that there is sufficient lead time for the notices to be manually reviewed and then processed for postage, etc. by the Division's mail room. Ms. Mahon states that the handwritten change of date, supra, was made by personnel in the Division's mail room who changed the date so that it conformed to the actual date that the notices and the CMR were delivered into the possession of the U.S. Postal Service.

Ms. Mahon states that the notation in the upper right hand corner of the CMR which states "Page: 18", for example, indicates that this was the eighteenth page of the entire CMR for September 13, 1993.

Ms. Mahon states that each statutory notice is placed in an envelope by Division personnel prior to being delivered into the possession of a U.S. Postal Service representative. The postal service representative then affixes his or her initials, signature or postmark to a page or pages of the CMR. The CMR in this matter contains a U.S. Postal Service postmark on each page and page 20 thereof is signed by a postal service employee.

The CMR in this case, at page 18, indicates that the subject notice was sent to 3410 Pons Food Corp., 3410 Broadway, New York, N.Y. 10031-7419 by certified mail using control number P 911 172 981. The CMR shows petitioner's name, address, the amount of postage paid and the certified mail fee charged by the postal office for this item of mail. The U.S. Postal Service postmark on each page of the CMR reflects that the subject notice was mailed on September 13, 1993. The last page of the CMR shows a total of 213 pieces of mail listed on the

CMR. This page reflects that a total of 213 pieces of certified mail were in fact delivered to the U.S. Postal Service. The signature of an employee of the U.S. Postal Service appears on the last page of the CMR.

The Mahon affidavit states that the Division does not request or retain receipts from certified and registered mailings in the regular course of business and as a routine office practice.

Ms. Mahon states that the procedures described supra and in her affidavit are the routine procedures of the CARTS Control Unit, are the general procedures followed in the regular course of business of the CARTS Control Unit, and, in particular, were the procedures followed by that unit on September 13, 1993 in mailing the subject notice.

The motion record also includes the affidavit of Daniel LaFar ("the LaFar affidavit"), principal mail and supply clerk in the Division's mail room.

Mr. LaFar states that his duties include supervision of the mail room staff in delivering outgoing mail to branch offices of the United States Postal Service. In describing the procedures of the Division's mail room in handling certified mail, Mr. LaFar states that after a notice is placed in the "Outgoing Certified Mail" basket in the mail room, a member of his staff weighs and seals each envelope, places "postage" and "fee" amounts on the letters and records the postage and fee amounts on the CMR.

A mail room clerk counts the envelopes and verifies the names and certified mail numbers against the information contained on the CMR. A member of the mail room staff then delivers the stamped envelopes and CMR to the Roessleville Branch of the United States Postal Service in Albany, New York. The postal employee affixes a U.S. Postal Service postmark and/or his or her signature to the CMR indicating receipt by the U.S. Postal Service.

In the ordinary course of business and pursuant to the routine practices and procedures of the mail room, the signed and/or postmarked CMR is picked up at the post office the following day and delivered to the originating office by a member of LaFar's staff.

The signed and postmarked CMR becomes, and is maintained as, the Division's record

of certified mail delivered to and received by the U.S. Postal Service for ultimate delivery to the taxpayer-addressees.

LaFar, upon review of the Mahon affidavit and attachments, including the signed and postmarked CMR for September 13, 1993, deposes that on that day an employee of his mail room delivered a piece of certified mail addressed to petitioner, as recited supra, to the Roessleville Branch of the United States Postal Service in Albany, New York in sealed postpaid envelopes for delivery by certified mail.

LaFar deposes that the mail room's routine office procedures described above for the receipt and processing of certified mail constitute the procedures followed by the mail room in the regular course of its business and that those same procedures were followed in mailing the pieces of certified mail to petitioner and its representative on September 13, 1993.

Petitioner filed a request for conciliation conference in an envelope bearing a U.S. Postal Service postmark of May 7, 1994, with the Division's Bureau of Conciliation and Mediation Services ("BCMS"). A copy of the envelope in which this request was mailed bears a U.S. Postal Service postmark of May 7, 1994, which was 236 days after the subject notice was issued to petitioner.

A Conciliation Order (CMS No.138522) dated July 15, 1994 was issued to petitioner advising it that "[s]ince the notice was issued on September 13, 1993, but the request was not received until May 9, 1994, or in excess of 90 days, the request is late filed." The Conciliation Order denied petitioner's request as untimely filed.

Thereafter, petitioner filed the instant petition dated July 19, 1994 with the Division of Tax Appeals. The petition is indated stamped as received by the Division of Tax Appeals on July 20, 1994.

SUMMARY OF THE DIVISION'S POSITION

The Division's motion contends that petitioner did not file its request for conciliation conference or petition within 90 days of the date the subject notice was issued, as required by Tax Law §§ 170(3-a)(a) and 1138(a)(1), respectively. Accordingly, the Division urges, the

Conciliation Order was properly denied and the instant petition should be dismissed for lack of subject matter jurisdiction.

CONCLUSIONS OF LAW

A. Tax Law §§ 1138(a)(1) and 1147(a)(1) address the authority of the Commissioner of Taxation and Finance to issue a determination of sales and/or use taxes due, and also set out a taxpayer's right to challenge such a determination. More specifically, Tax Law § 1147(a)(1) provides as follows:

"Any notice authorized or required under the provisions of this article may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this article or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable. A notice of determination shall be mailed promptly by registered or certified mail. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this article by the giving of notice shall commence to run from the date of mailing of such notice."

In turn, Tax Law § 1138(a)(1) provides that a notice of determination:

"shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the division of tax appeals for a hearing, or unless the commissioner of taxation and finance of his own motion shall redetermine the same" (emphasis added).

Prior to petitioning the Division of Tax Appeals for a hearing, a taxpayer may request an informal conciliation conference at the Division's Bureau of Conciliation and Mediation Services (Tax Law § 170[3-a][a]; 20 NYCRR 4000.3[a]; 4000.5[c]). The time for filing a request for a conciliation conference is determined by the time period set out in the statutory provision authorizing the assessment which, in this case, was 90 days (Tax Law §§ 170[3-a][a]; 1138[a][1]; see, 20 NYCRR 4000.3[c]). If after the Conciliation Order is issued a taxpayer is still unsatisfied, he/she has an additional 90 days from the issuance of such order within which to file a petition with the Division of Tax Appeals (Tax Law § 170[3-a][e]). Where a document required to be filed within a prescribed period or on or before a prescribed date by section 170(3-a) of Article 8 or any provision of Article 40 of the Tax Law is, after such period or date, delivered by United States mail to BCMS or the Division of Tax Appeals, the date of the U.S.

Postal Service postmark stamped on the envelope is deemed to be the date of filing (20 NYCRR 3000.16; 4000.7). Failure to timely file a petition (or request a conciliation conference) challenging a notice of determination is fatal, since it bars the Division of Tax Appeals from entertaining jurisdiction (Matter of Sak Smoke Shop, Tax Appeals Tribunal, January 6, 1989).

B. Where the Division claims a taxpayer's protest against a notice was not timely filed, the initial inquiry must focus on the issuance of the notice. To be "properly mailed", a notice of determination must be mailed by registered or certified mail to the taxpayer's last known address (Tax Law § 1147[a][1]; see, Matter of Katz, Tax Appeals Tribunal, November 14, 1991). In turn, when a notice has been found to have been properly mailed, "a presumption arises that the notice was delivered or offered for delivery to the taxpayer in the normal course of the mail" (see, Matter of Katz, supra). However, the "presumption of delivery does not arise unless or until sufficient evidence of mailing has been proffered" (id.).

C. The mailing evidence required must contain proof of a standard procedure used by the Division for the issuance of notices by one with knowledge of the relevant procedures and proof that the standard procedure was followed in the particular instance in question (see, Matter of Katz, supra; Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991). Even though petitioner herein does not contest the date of mailing or its receipt of the notice, when the timeliness of a request for hearing is at issue, the Division must come forward with sufficient proof of mailing (id.).

D. In this case, the Division has introduced adequate proof of its standard mailing procedures in the affidavit of Geraldine Mahon, by one with knowledge of such procedures. The Mahon affidavit provided proof of the standard procedure used by CARTS in the preparation and issuance of notices and the chain of custody between her office and that of Mr. LaFar in the Division's mail room. In addition, the Mahon affidavit established that the standard procedures were in fact followed on September 13, 1993 in the issuance of the subject notice. Ms. Mahon's affidavit was buttressed by a properly completed and signed certified mail record, which included the U.S. Postal Service postmark for September 13, 1993.

The affidavit of Daniel LaFar establishes the standard procedures followed in the regular course of business of the Division's mail room in accepting, processing and transporting certified mail. The LaFar affidavit describes the standard procedures followed in the affixation of postage and fees to the envelopes (and CMR), and ultimate delivery of this mail matter (and CMR) to the possession, custody and control of the United States Postal Service for delivery to the addressees. The Mahon and LaFar affidavits and attachments establish both the routine procedures with respect to certified mailings followed by their respective offices in the regular course of business, and also that those procedures were followed on September 13, 1993 in mailing the subject notice. Therefore, it is determined that the Division has clearly established the proper mailing of the subject notice and the presumption of receipt by petitioner is thereby established.

E. The U.S. Postal Service postmark contained on the envelope used to mail the request for conciliation established that it was not mailed until May 7, 1994, or 236 days after the subject notice was issued. The instant petition was not mailed until July 19, 1994. Neither the petition nor the request for conciliation conference were filed within 90 days of issuance of the subject notice of determination. Accordingly, it is concluded that petitioner failed to timely file a request for conciliation conference or to file a petition with the Division of Tax Appeals in response to the subject notice (see also, Matter of Air Flex Custom Furniture, Tax Appeals Tribunal, November 25, 1992). The Division of Tax Appeals is without jurisdiction to hear petitioner's challenge to the subject notice, and the assessment is fixed and final (Tax Law § 1138[a][1]).

F. The petition of 3410 Pons Food Corp. is dismissed.

DATED: Troy, New York
January 5, 1995

/s/ Carroll R. Jenkins
ADMINISTRATIVE LAW JUDGE